United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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75-2066

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To be argued by
DOUGLAS S. EAKELEY

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-2066

UNITED STATES ex rel. FRANCISCO MARTINEZ, a/k/a TONY CRUZ,

Petitioner-Appellant,

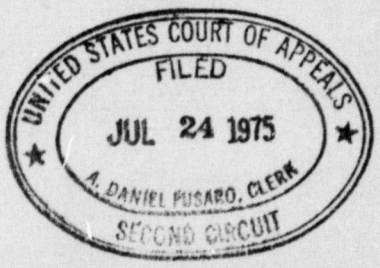
-against-

WARDEN JAMES A. THOMAS,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PETITIONER-APPELLANT



DOUGLAS S. EAKELEY
Attorney for Petitioner-Appellant
Debevoise, Plimpton, Lyons & Gates
299 Park Avenue
New York, New York 10017
(212) 752-6400

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Respondent-Appellee.

REPLY BRIEF FOR PETITIONER-APPELLANT

This brief is submitted on behalf of Petitioner-Appellant, Francisco Martinez ("Martinez"), in reply to certain arguments and statements made in the brief of Respondent-Appellee ("Respondent"). Failure to reply to a particular matter in Respondent's brief means only that the matter has been sufficiently addressed in Martinez' main brief or that it is insignificant with respect to the disposition of this case.

ARGUMENT

POINT I

THE COURT ERRED IN CONCLUDING THAT MARTINEZ COMPETENTLY AND KNOWINGLY WAIVED HIS RIGHT TO COUNSEL

A. No "Affirmative Acquiescence"

Respondent offers little other than unsupported assertions to counter Martinez' argument that the record fails to demonstrate that he "intelligently and understandingly rejected the offer [of counsel]." Carnley v. Cochran, 369 U. S. 506, 516 (1962). Although Respondent contends at pages 20 and 22 of his brief that Martinez "adamantly insisted on representing himself", and that "[t]he record also reveals that [Martinez] was warned about the dangers of proceeding pro se, and went into the trial with 'eyes open'", this is not in fact the case. There is absolutely no indication in the record that the trial judge cautioned Martinez about conducting his own defense or inquired into his reasons or capacity for proceeding pro se. See TT at 1-12; Pet. App. at 83-94. And the trial transcript, far from reflecting that Martinez "adamantly insisted on representing himself", reveals that Martinez insisted on the contrary that he be permiteed to obtain outside counsel to represent him. See main brief at 13-16; TT at 40, 43, 116-117, 120, 135, 142, 144.

The only occasion on which Martinez expressed the desire to proceed alone is set forth at pages 11-12 of the trial transcript, after Justice Gellinoff had refused to grant assigned counsel or Martinez a continuance:

> "THE DEFENDANT: I'm not trying to avoid going to trial.
>
> THE COURT: I know. That's what it looks like, you see. Now, I cannot recognize it. I'm the kind of a fellow who'd like to give you every conceivable break imaginable and I do whatever I can, but I still have a job to do. After all, I've got to uphold the law. I've got to do my job. This case was set for today. My whole calendar was cleared. If I don't try this case, I have to go and cut out paper dolls, twiddle my thumbs. I've got nothing to do.
>
> THE DEFENDANT: All I ask is for a week or two, Your Honor, so I could have my lawyer in and I could have my witnesses in.
>
> THE COURT: My friend, listen to me. It's just too late to make that request.
>
> THE DEFENDANT: In that case, I'd like to represent my own self.
>
> THE COURT: If you want to represent yourself, it's perfectly agreeable to me. I'll help you and, as a matter of fact, let Mr. Leopold sit with you, you know, to help you, to give you ideas, to tell you and represent yourself. It's perfectly okay. Let him make objections to protect things that you don't know about. When it comes to asking questions I'll let you ask questions. I'll let you do whatever you want. I'll let you represent yourself. That request I will allow." [Pet. App. at 93-94].

Minutes later, however, after Justice Gellinoff had ordered the selection of the jury, Martinez made it very clear that he did <u>not</u> want to represent himself or proceed with Leopold, but wished to obtain an outside

lawyer instead:

"MR LEOPOLD: Again, at this juncture, Your Honor, Mr. Martinez tells me he doesn't want me to say anything to anybody. He wants to get his own lawyer.

THE COURT: All right, okay. Now, do you want to ask any questions of these jurors?

THE DEFENDANT: This is the first time in my life I've ever been before the Supreme Court. I don't know what to ask.

THE COURT: All right, then, Mr. Leopold, then you ask whatever questions you deem necessary.

MR. LEOPOLD: Well, Your Honor, the problem here--

THE COURT: I know the problem, Mr. Leopold. Do as the Court says. Ask whatever questions you deem necessary. Let's not go over this thing. We've gone over it, and the Court has made a ruling and let's proceed. Your record is protected. You put your position on. He's put his position on, and don't keep on repeating it.

MR. LEOPOLD: I can' help it because--

THE COURT: Well, we must proceed.

MR. LEOPOLD: Your Honor is directing me to ask questions?

THE COURT: I'm not directing you to ask questions. I'm directing you to act as a lawyer. You, as a lawyer, use your judgment as to what questioning should be asked, and then consult with the defendant.

THE DEFENDANT: I want my own lawyer to do this.

THE COURT: You've said that to me. Please proceed.

THE DEFENDANT: I don't want him to do this. I want to get my own lawyer to do this for me. I don't want him to do nothing." [TT at 25-26; Pet. App. at 101-102].

In sum, the record fails to indicate that Martinez

"clearly and unequivocally" declared that he wished to proceed pro se. United States ex rel. Davis v. McMann, 386 F.2d 611, 620 (2d Cir. 1967), cert. denied, 390 U.S. 958 (1968). Nor can his refusal to continue with Mr. Leopold, after the latter had stated that he was unprepared and had just returned from vacation, constitute a waiver under the circumstances of this case.* See Sawicki v. Johnson, 475 F.2d 183 (6th Cir. 1973); Rastrom v. Robbins, 440 F.2d 1251 (1st Cir.), cert. denied, 404 U.S. 863 (1971); United States ex rel. Davis v. McMann, supra.

The decisions by this Court in United States v. Rosenthal, 470 F.2d 837 (2d Cir. 1972), cert. denied, 412 U.S. 909 (1973), United States v. Spencer, 439 F.2d 1047 (2d Cir. 1971), and United States v. Duty, 447 F.2d 449 (2d Cir. 1971), cited at page 20 of Respondent's brief, do not support Respondent's position, but, on the contrary, highlight the inadequacies of the proceedings in the instant case. In

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* Respondent asserts at page 23 of his brief that this position is "ridiculous", and claims that "if counsel was unprepared, a large portion of the responsibility was petitioner's." This claim is based solely on Martinez' alleged refusal to provide Mr. Leopold with the names of his witnesses during their preliminary interview in court. See main brief at 46. But Mr. Leopold never testified that Martinez was uncooperative. Rather, it was his testimony that he had objected to going to trial on August 4, 1966 becase the Legal Aid investigation was incomplete and because, having just returned from vacation, he was unprepared and had not been in contact with Martinez at all. [HT at 34-36].

Rosenthal, the defendant discharged his acting counsel four days before the trial date (which had been set for six weeks) and two years after the indictment. Discharged counsel, who had represented the defendant in an earlier prosecution and appeal arising from the same tax investigation, was directed to assist defendant at trial. There was no issue as to the competency of the defendant, and this Court had no difficulty determining that defendant was not prejudiced by his "knowing and intelligent" discharge of counsel.

In Duty, the defendant lacked only three credits for a B.S. degree in chemistry at Kent State University. At the start of trial, his privately-retained counsel moved to be discharged because of his client's desire to proceed pro se. Prior to accepting the waiver of counsel, the trial court conducted an examination of the defendant to determine the reasons for the waiver and his capacity to represent himself. In affirming the conviction, this Court emphasized that the defendant had not at any time expressed dissatisfaction with counsel. Moreover, there was no question as to defendant's competency to proceed pro se.

Finally, in Spencer, the trial court made an interim appointment of counsel after defendant had declared that he wished to proceed by himself. Entry of defendant's plea of not guilty was deferred; only after two hearings did

the court grant the assigned counsel's motion to be relieved. In affirming, this Court, per Judge Lumbard, summarized the requirements for a valid waiver of counsel:

> "In our previous decisions on this issue, we have looked in particular to determine whether there has been a full and calm discussion between the judge and the defendant, whether the defendant understood that he had a choice between proceeding pro se and with assigned counsel, whether the defendant understood the advantages of having one trained in the law to represent him, and whether the defendant had the capacity to make an intelligent choice." 439 F.2d at 1050.

Judge Lumbard also suggested that counsel be appointed "as a resource" when a defendant elects to represent himself--with the following caveat:

> "This alternative should not be offered, however, until after the defendant has clearly and unambiguously waived his right to full representation; and obviously such a determination can be made only after a complete and penetrating examination by the trial judge, such as that conducted by Judge Zampano here, of all the circumstances under which the defendant's election is made." 439 F.2d at 1051-1052. (Emphasis added).

In the instant case, there was neither discussion nor examination by the trial judge. Appointed counsel, who had conferred only twice with Martinez, admitted that he was unprepared. Martinez had learned only 24 hours before that he would be going to trial that day. Although the trial date had been set for less than a month--in the absence of Mr. Leopold, who was on vacation--Justice Gellinoff refused to grant any adjournments, despite Mr. Leopold's protestation

that the case had been assigned to the trial part by mistake. Under these circumstances, it cannot be considered that Martinez "clearly and unambiguously waived his right to full representation . . . ."

B. Martinez' Lack of Competence to Waive His Right to Counsel

Respondent argues at some length that this Court should not "follow" the Ninth Circuit's decision in Sieling v. Eyman, 478 F.2d 211, 214-215 (9th Cir. 1973), and embrace a "new" standard with respect to an accused's competence to waive counsel and to represent himself at trial. See Respondent's brief at 24-26. Respondent also asserts in a footnote that, under then-applicable law, New York Code of Criminal Procedure § 658 (1939), "the competency standard for standing trial also subsumed a competency for making one's own defense." Respondent's brief at 26. Respondent nowhere sets forth the content of such standard. Nor is this the law in this Circuit.

Section 658 provided in pertinent part:

> "If at any time before final judgment it shall appear to the court having jurisdiction of the person of a defendant indicted for a felony or a misdemeanor that there is reasonable ground for believing such defendant is in such a state of idiocy, imbecility or insanity that he is incapable of understanding the charge, indictment or proceedings or of making his defense, . . . the court . . . may in its discretion order such defendant to determine the question of his sanity." (Emphasis added).

In United States ex rel. Curtis v. Zelker, 466 F.2d 1092, 1095 n. 5 (2d Cir. 1972), cert. denied, 410 U.S. 945 (1973), this Court determined that the foregoing "test" was substantially the same as that set forth in Dusky v. United States, 362 U.S. 402 (1960): whether an accused "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him."*

However, consulting with a lawyer does not require the same degree of competence as actually conducting a defense. See Westbrook v. Arizona, 384 U.S. 150 (1966). And the Note, "Competence to Plead Guilty: A New Standard", 1974 Duke L.J. 149, 156 (1974), cited in Respondent's brief at 26, recognizes the significant practical distinction between the standards utilized to determine competence to stand trial and to determine competence to waive constitutional rights:

> "The validity of a guilty plea or a waiver of constitutional rights is determined by a second body of standards and procedures which have developed independently of, and have been applied without reference to, those used to determine competence to stand trial. Although the constitutional requirements which govern the waiver of rights and those which test the validity of a guilty plea are themselves of distinct origin

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* The current New York standard, set forth in § 730.10 of the Criminal Procedure Law, is explicitly derived from Dusky. See Practice Commentary to § 730.10 (McKinney's 1971).

> and differ in scope and detail, they impose a common prerequisite to the validity of any guilty plea or waiver--that it be the result of the defendant's free and intelligent choice."

Thus, in the landmark case of United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964), this Court indicated that an individual must have the "capacity to make an intelligent choice" in order validly to waive counsel. Similarly, in Rees v. Peyton, 384 U.S. 312, 314 (1966), the Supreme Court refused to permit the withdrawal of a petition for certiorari until it was determined whether the petitioner "has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in these premises." These formulations of the "capacity to choose" standard do not significatnly differ from the more fulsome definition set forth in Sieling v. Eyman.*

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* Contrary to Respondent's assertion at page 26 of his brief that the Sixth Circuit has "already rejected" "the Ninth Circuit's approach", the case of United States v. Harlan, 480 F. 2d 515, 517 (6th Cir.), cert. denied, 414 U.S. 1006 (1973) cited neither Sieling v. Eyman nor Westbrook v. Arizona in ruling without discussion that "the test for competency to plead guilty should be more stringent than the test for competency to stand trial." This ruling has not been followed by any other court; moreover, unlike Westbrook, Harlan did not involve the issue of competency to waive counsel and conduct one's defense.

1. Martinez' Medical Records. Respondent suggests that the "account" of Martinez' mental history set forth at pages 17-20 of Martinez' main brief is "misleading", and cites as the basis for such assertion several notes found in Martinez' voluminous medical records and the "contemporaneous evidence" of testimony of "persons in major contact with petitioner during the trial or at about that time". Respondent's brief at 14-19. However, Respondent does not deny that Martinez was involuntarily institutionalized as a result of the various diagnoses and examinations which Respondent contends are "conflicting".* With respect to the "contemporaneous evidence", it should be recalled that both Mr. Leopold and Mr. Sam Segal requested that Martinez be committed for psychiatric examination prior to imposition of sentence, on the basis of their contact with him. See main brief at 30-32, 41-42.

2. Testimony of Dr. Kinzel. Respondent's statement at page 18 of his brief that Dr. Kinzel testified that "Martinez was marginally competent to stand trial" is itself somewhat disingenuous, given Respondent's assertion that

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* Respondent also implies, by referring to several notes in Martinez' medical records from Dannemora, that Martinez might have simulated his illness. However, this ignores Dr. Kinzel's testimony that Martinez' illness was such that he would tend to minimize its seriousness, and that his symnptoms as observed by trained psychiatrists were incapable of being feigned. [HT at 77-79, 81-82; Pet. App. at 64-66, 68-69].

the competency test for standing trial is the same as that for conducting one's defense. Indeed, counsel for Respondent seems also to have assumed that there is a difference between competence to stand trial and competence to conduct one's defense. Thus, on cross examination the following exchange occurred between Mr. McMurry and Dr. Kinzel:

> "Q. Would you be able to say with reasonable degree of certainty today that Mr. Martinez was not competent to stand trial in 1966?
>
> A. Yes.
>
> Q. You would say that he was not?
>
> A. My opinion is that he was not competent to conduct his own defense. As I said before, I have seen cases such as this where if the attorney takes over and if he is supported and corrective of some of the reality misconceptions they do tend to diminish. My impression is it was that situation of becoming responsible for his own defense that may have been the stress--that may have been the thing he was incompetent to do.
>
> Q. To conduct his own defense?
>
> A. Yes.
>
> Q. But would you say that he was incompetent to stand trial?
>
> A. I would say that he was probably marginally competent to stand trial in the sense that he knew the charges against him and he did start to make an attempt to cooperate with his counsel." [HT at 75-76; Pet. App. at 62-63].

Respondent also questions the "credibility" of Dr. Kinzel's testimony and states that "[t]he law in this Circuit is that such diagnoses are of limited probative value." Respondent's brief at 29, citing Petition of Pinto,

152 F. Supp. 892 (S.D.N.Y. 1957). This assertion is without basis. In Petition of Pinto, the trial court after a hearing ruled that a petitioner for naturalization had intentionally waived his rights to citizenship 15 years earlier to avoid conscription. At the hearing, petitioner had called a psychiatrist, who based his testimony that petitioner was "psychoneurotic" solely on one interview and a single, brief notation on an army pre-induction physical report. Under such circumstances, the trial court correctly considered such proffered testimony not probative.

Moreover, counsel for Respondent in another proceeding before this Court has recognized the validity of competency hearings (with their attendant psychiatric testimony), years after the event, ordered by the courts in this Circuit. See Brief for Appellee in United States ex rel. Putmon v. Henderson, Dkt. No. 75-2586, at 17. Both Judge Tyler and Magistrate Goettel considered it constitutionally necessary to provide such a hearing for Martinez in the instant case, in large part for the purpose of determining his mental condition at the time of trial. As explained by the author of the Note, "Incompetency to Stand Trial", 81 Harv. L. Rev. 454, 470 (1967) [cited in Respondent's brief at 25]: " . . . an intelligent determination of a defendant's capacity for rational understanding ought to rest on a deeper and more comprehensive diagnosis of

his mental condition than laymen can make through observation of his overt behavior."

Dr. Kinzel is eminently qualified. His testimony was based upon his analysis of Martinez' extensive medical records, together with his review of certain portions of the trial transcript and his examination of Martinez. This testimony was unshaken upon cross examination and, as Respondent conveniently ignores, was supported by the prior testimony at the coram nobis hearing of another psychiatrist, Dr. Gorlicki. The latter personally examined Martinez on several occasions while he was undergoing treatment at Dannemora--less than one year subsequent to his conviction. As set forth at pages 27-30 of Martinez' main brief, Dr. Gorlicki also testified quite unambiguously (notwithstanding the interventions of the coram nobis court) that Martinez in 1966 was suffering from a "defective mental state", and that, in his opinion, he was not competent to represent himself at trial. [CNT at 61-62, 70; Pet. App. at 157-58, 166].

Given Respondent's failure to introduce any expert witnesses, and given the extensive basis for Dr. Kinzel's testimony reflected in Martinez' medical records and supported by Dr. Gorlicki's testimony in 1968, it is respectfully submitted that the District Court's finding to the

contrary that Martinez was competent to waive counsel and represent himself is clearly erroneous.

POINT II

THE COURT ERRED IN CONCLUDING THAT THE FAILURE OF THE TRIAL COURT TO INQUIRE INTO MARTINEZ' CAPACITY TO WAIVE HIS RIGHT TO COUNSEL WAS CONTITUTIONAL

Respondent asserts that, since "the defendant's competence was never put in issue . . . [t]he District Court, therefore, was absolutely correct in concluding that there was no need of another inquiry hearing by virtue of Westbrook to determine competency to waive counsel." Respondent's brief at 33. (Emphasis added). This is an unfair misstatement of this case and of Martinez' position: there was never any inquiry by the trial court (much less a hearing) into Martinez' reasons or capacity to conduct his own defense; Martinez' competence was not "put in issue" precisely because there was no such inquiry and because he was representing himself.

It is likewise erroneous to state that the trial judge engaged in an "extensive dialogue" with Martinez prior to acceptance of his "election" to proceed pro se: the trial transcript reveals that Martinez spoke less than 200 words to Justice Gellinoff before the latter accepted his

"waiver"; of these exchanges, the greatest portion involved Martinez' insistence that he did not want Mr. Leopold, but wanted a private lawyer instead, and Justice Gellinoff's denial of this request. [TT at 1-12; Pet. App. at 83-94].

It has long been the rule in this Circuit that, prior to the acceptance of a proffered waiver of counsel, a trial court must explain to the accused the right to counsel, warn him of the pitfalls of proceeding alone, and inquire into his capacity to effect a valid waiver. United States v. Plattner, supra, 330 F.2d 271 (2d Cir. 1964); United States ex rel. Higgins v. Fay, 364 F.2d 219 (2d Cir. 1966); United States v. Harrison, 451 F.2d 1013 (2d Cir. 1971) (per curiam); United States ex rel. Brown v. Fay, 242 F. Supp. 273 (S.D.N.Y. 1965). Failure to observe such procedures will result in reversal if there is any question that the waiver was not competent and understanding. Thus, for example, in United States v. Harrison, supra, defendant's conviction was reversed on the basis that the trial court had failed to warn or inquire of defendant before accepting his election to proceed pro se, even though defendant was a lawyer:

> "The Sixth Amendment provides that in all criminal prosecutions the accused shall enjoy the right to have the assistance of counsel. . . .
>
> "The only way this essential right to counsel can be waived is by giving specific instructions to the accused informing him of his rights and then by having the accused make an intelligent waiver of such rights. . . .

"Here the record fails to show any advice to or inquiry of appellant on the date of trial or shortly before it by the trial judge on the subject of his right to be defended by counsel at trial or any finding that appellant made a knowing and intelligent waiver of that right." 451 F.2d at 1014-1015. (Emphasis added).

Respondent claims that, "[w]hile a specific inquiry may be preferable in the usual case, United States v. Harrison, 451 F.2d 1013 (2d Cir. 1971), it is not, as the District Court noted, constitutionally compelled. Johnson v. Zerbst, 304 U.S. at 465; United States v. Rosenthal, 470 F.2d 837 (2d Cir. 1972); United States v. Duty, 447 F.2d 449 (2d Cir. 1971)." Respondent's brief at 34. These cases offer scant support for such a proposition, however. As noted supra at 6, the trial court in Duty actually made inquiries of the defendant before discharging defendant's privately-retained attorney. In Rosenthal, defendant's competency was not an issue, and his former counsel (who had represented the defendant in a previous, similar prosecution) remained available for advice during the trial. This Court found that, on the facts of the case, and given the defendant's "long association with his counsel", it was not error for the district court to have failed to warn him of the pitfalls of representing himself. 470 F.2d at 844-845. Finally, in this regard, the Supreme Court, per Mr. Justice Black, ruled as follows in Johnson v. Zerbst, 304 U.S. 458, 465 (1938):

"The constitutional right of an accused to be represented by counsel invokes, of itself, the

> protection of a trial court, in which the accused--whose life or liberty is at stake--is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

Put otherwise by the author of the Note, "Competence to Plead Guilty: A New Standard", supra:

> "Because of the importance of the right to counsel in preserving the free exercise of other constituional rights in the criminal process, an affirmative duty is imposed on the court to determine in advance that a waiver of counsel is intelligently made and to indicate this clearly in the record." 1974 Duke L. J. at 158.

It is difficult to understand how this "protecting duty" can adequately be discharged where, as here, the trial court makes no inquiry whatsoever before allegedly rendering a "determination"--especially when even that determination does not appear on the record. Even assuming there was such a determination, it is clear that "there was an insufficient inquiry to afford a basis for deciding the issue of waiver." Drope v. Missouri, ___ U.S. ___, 43 L. Ed. 2d 103, 119 (1975).

Analogously, Rule 11 of the Federal Rules of Criminal Procedure requires that the trial court, prior to accepting a plea of guilty, conduct a colloquy with the defendant in order to determine that there is a factual basis for the plea and that it is voluntary and

understanding. Failure to comply with these requirements renders the plea invalid. McCarthy v. United States, 394 U.S. 459 (1969); Boykin v. Alabama, 395 U.S. 238 (1969). As the Court explained in the latter case:

> "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." 395 U.S. at 243-244.

Indeed, even before the 1966 amendments to the Federal Rules of Criminal Procedure, this Court required that a trial judge inquire of the accused before accepting a plea of guilty, to determine if the waiver of constitutional rights it entails is valid. As Judge Waterman wrote in United States v. Lester, 247 F.2d 496, 499-500 (2d Cir. 1957):

> "A mere routine inquiry--the asking of several standard questions--will not suffice to discharge the duty of the trial court. It is the duty of a federal judge before accepting a plea of guilty to thoroughly investigate the circumstances under which it is made. . . . Even when the defendant is represented by counsel it has been held that the mere statement of the accused that he understands the charge against him does not relieve the court of the responsibility of further inquiry. . . . When, as in the present case, the defendant appears before the court without the benefit of counsel an even more exacting inquiry is demanded." (Emphasis added).

These requirements have also been applied to invalidate guilty pleas rendered in a state court. United States ex rel. Dunn v. Casscles, 494 F.2d 397 (2d Cir. 1974).

Respondent apparently does not contest that the record is barren of any inquiry or determination as to the validity of Martinez' putative waiver of counsel. Rather, he suggests that "in view of petitioner's adamance on proceeding pro se, a formal determination on the record would have been futile." Respondent's brief at 35. However, as discussed supra at 2-5, there was no such "adamance": on the contrary, the trial transcript reveals that Martinez did not wish to represent himself, but desperately sought outside counsel throughout the proceeding.*

The District Court concluded that the trial judge had no obligation to inquire whether Martinez' purported

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* Nor is it correct that "the trial court risked reversal if he did not permit petitioner to proceed pro se." Respondent's brief at 21. In virtually all cases in which the right to proceed pro se has been recognized, the courts have stressed the need for appropriate inquiry and advice by the trial judge before accepting the concomitant waiver of counsel. Faretta v. California, ___ U.S. ___, 43 U.S.L.W. 5004, 5012-5013 (June 30, 1975); People v. McIntyre, 36 N.Y.2d 10, 19 (1974) ("Where a court feels that the motion [to proceed pro se] is a disingenuous attempt to subvert the overall purpose of the trial . . . , the proper procedure is to conduct a dispassionate inquiry into the pertinent factors."); United States v. Plattner, supra; United States ex rel. Maldonado v. Denno, 348 F.2d 12, 16 (2d Cir. 1965) ("The State contends that if [the defendant's] request [to proceed pro se] had been granted a reviewing court might well have found that he had not executed an intelligent and knowing waiver of his right to the assistance of counsel. Any doubt on this score, however, could have been settled by an immediate inquiry prior to trial to determine whether [the defendant] had made his choice 'with eyes open,' an inquiry which the trial court declined to conduct.").

waiver of counsel was knowing and intelligent, and that his "determination" that Martinez was in fact competent--although uninformed by the results of any inquiry and absent from the record--was constitutionally adequate. For the foregoing reasons, and for the reasons set forth in Martinez' main brief, it is respectfully submitted that this conclusion is incorrect as a matter of law.

POINT III

THE COURT ERRED IN CONCLUDING THAT MARTINEZ WAS NOT DEPRIVED OF HIS RIGHT TO COUNSEL BY THE TRIAL COURT'S DENIAL OF A CONTINUANCE TO OBTAIN PRIVATE COUNSEL AND BY THE TRIAL COURT'S REFUSAL TO PERMIT PRIVATE COUNSEL TO PRESENT MARTINEZ' DEFENSE

Respondent does not contest that the trial judge failed to make any inquiry into the reasons why Mr. Leopold was unprepared for trial, why the case was inadvertently assigned to the ready Trial Term, or why Martinez desired a week's extension to obtain other counsel. Given the lack of such inquiry, it is difficult to understand how the trial judge could appropriately exercise his "discretion" in refusing to grant an extension of time. Contrary to Respondent's suggestion at pages 7-8 of his brief, moreover, this was not a "jail case": Martinez was incarcerated at the time because he was serving a prior year's sentence--not because he was

awaiting trial. It was largely due to this incarceration at Rikers Island that Martinez was unable to locate outside counsel, contact his family, or even consult with the Legal Aid Society.

Martinez' reasons for his dissatisfaction with the assistance of the Legal Aid Society only began to arise after he was transferred to Rikers Island on June 14, 1966. He was not produced by the Correctional Authorities at any of the calendar calls held in the month of June, nor does it appear that he was informed that a trial date had been set at the June 20 conference for July 5, 1966--in the absence of Mr. Leopold. [Pet. Ex. 4(h) and (i)]. On July 5, 1966, his case was marked ready and sent to the trial part--in his absence and without the presence of any Legal Aid representative . [Stip. at 2-3]. During the month of July, Mr. Leopold was on vacation; he only saw Martinez for the second time at the calendar call on August 3, 1966, at which point he informed Justice Brust that he was unprepared and that the case had been assigned to the trial part by mistake. As the District Court noted in its Opinion at 10, "communications within the Legal Aid Society appear to have broken down." In the interim, of course, Martinez was making bona fide attempts to obtain other counsel--attempts which ultimately led to the retaining of Mr. Brown. Mr. Brown was not permitted to present

Martinez' defense, however.

Under these circumstances, it cannot be said that the trial court discharged its "serious and weighty responsibility" to protect Martinez' constitutional right to counsel. "When serious allegations are made by an indigent defendant that his appointed counsel is not providing adequate representation, they should not be taken lightly." Sawicki v. Johnson, supra, 475 F.2d at 184. It is respectfully submitted that the District Court's conclusion that Martinez was not unconstitutionally deprived of his right to counsel by Justice Gellinoff's refusal to grant him an extension of time or to permit private counsel to enter the case before the presentation of his defense is legally incorrect and constitutes reversible error.

CONCLUSION

For the foregoing reasons and for the reasons set forth in Martinez' main brief, it is respectfully submitted that Martinez is entitled to the relief sought.

DOUGLAS S. EAKELEY

Attorney for Petitioner-Appellant,
Francisco Martinez
Debevoise, Plimpton, Lyons & Gates
299 Park Avenue
New York, New York 10017
(212) 752-6400

Dated: New York, New York
July 24, 1975